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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 2/2018 concerning Haritos Mahmadali Rahmonovich Hayit (Tajikistan)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/36/38), on 6 December 2017 the Working Group transmitted to the Government of Tajikistan a communication concerning Haritos Mahmadali Rahmonovich Hayit. The Government did not reply to the communication in a timely manner. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Mr. Hayit is a Tajik citizen who was born in 1957 in the Rudaki District of Tajikistan.

5. The source reports that Mr. Hayit has been a prominent member of the Islamic Renaissance Party since its inception in 1999, and had formerly served as its Deputy Chairman. As an outspoken advocate against the administration of President Rahmon, he was subjected to systematic surveillance and pressure from the Tajik authorities, who visited his home regularly and inquired about his whereabouts. In April 2013, he was reportedly beaten by persons believed to be government agents.

6. The source reports that, in September 2015, the Government of Tajikistan intensified its intimidation and harassment of Party members by shutting down the Party and all of its operations. That same month, the Government allegedly used a failed coup led by Deputy Defence Minister General Abduhalim Nazarzoda as justification for cracking down on Party members. In particular, the authorities blamed the Party for the violent protest that took place on 4 September 2015 and resulted in 39 deaths, of which 14 were law enforcement officers.

Arrest and detention

7. According to the source, it was in the context of the 4 September protest that Mr. Hayit was arrested outside his home in Dushanbe on 16 September 2015. He was reportedly beaten upon arrest and held at an interrogation facility. Officers also conducted a search of his home without a warrant.

8. The source reports that the Government simultaneously arrested 12 other Islamic Renaissance Party political leaders. Mr. Hayit and the other Party leaders were jointly tried for alleged extremist activities and for alleged participation in the coup. Mr. Hayit remained in detention throughout the period before the trial and was reportedly routinely beaten and interrogated during that time. The torture that he sustained resulted in broken bones and long-term injuries.

9. Mr. Hayit was reportedly not brought before a judge until three days after his arrest, and was deprived access to a lawyer until 10 days after his arrest. His meetings with a lawyer — of which there were only five or six prior to the trial — were always supervised by Government agents. In addition, the lawyers of Mr. Hayit were only given access to the Government's criminal complaint less than 16 days prior to the trial and were denied access to much of the evidence that the Government deemed classified. The Government also reportedly harassed the lawyers representing the Party members, including jailing or driving into exile several defence counsels.

10. According to the source, Mr. Hayit was charged with murder, terrorism and "forcible" actions against the regime under numerous articles of the Criminal Code of Tajikistan, namely: article 32, part 3; article 104, part 2 (a) (b) (g) (h) (i) (k) (l) and (n); article 131, part 3 (a); article 170; article 179, part 3 (a); article 187, parts 1 and 2; article 189, part 3 (a); article 195, part 3; article 199, part 4 (a) (b) and (c); article 306; article 307, parts 1 and 3; article 309, part 2 (b); and article 313. His trial began on 9 February 2016.

Trial proceedings

11. According to the source, the court that heard the case of Mr. Hayit was unique. It was not a standard civilian-led trial, but was instead led by the Chief Military Judge, even though Mr. Hayit was not in military service. Mr. Hayit and his co-defendants were tried behind closed doors, and not in a public trial, which the Government justified on the basis of the supposedly "classified" nature of the proceedings. Immediately prior to being presented in court, the co-defendants from the Party were forced to run to the courthouse while chained together, causing them to fall over and sustain injuries.

12. The trial reportedly lasted several months. According to the source, at least two witnesses were coerced into giving testimony and others declared without any factual

support that Mr. Hayit had harboured extremist ideas. One witness recanted his testimony, claiming government coercion. The evidence presented by the prosecution lacked specific factual details. In addition, the defence was limited in its ability to examine the criminal complaint or the Government's evidence and was denied the opportunity to present its own expert witnesses, effectively destroying its ability to present a case for the defence of Mr. Hayit.

13. On 2 June 2016, the court rendered its verdict, and Mr. Hayit was convicted and sentenced to life imprisonment. His co-defendants similarly were sentenced to a range of punishments.

14. According to the source, neither the court nor the Government ever publicly announced the final verdict against Mr. Hayit and his co-defendants. Rather, it was leaked to the public shortly after it was issued. The focus of the court's verdict was not on evidence of any wrongdoing by Mr. Hayit or his co-defendants. Instead, the court emphasized an unpublished (and unfinished) article that Mr. Hayit had allegedly wrote, entitled "The Position of Islam in Our Life", which had allegedly been seized during a search of his home and which "specialists of the Ministry of Education and Science of the Republic of Tajikistan and the Committee for Religious Affairs and Supervision of Traditions and National Celebrations of the Government of the Republic of Tajikistan" had concluded constituted a condemnation of civil society in Tajikistan. The court reportedly gave no weight to the evidence presented by the defence.

15. The source reports that Mr. Hayit's subsequent appeal to the Tajikistan Supreme Court, presided by judges who were reportedly subordinates of the Chief Judge who had also presided over his trial, failed. The opinion of the Supreme Court contained limited information about the proceedings in the trial court, but confirmed that the trial court had accepted in their entirety the allegations of the Government against Mr. Hayit.

16. According to the source, Mr. Hayit is unable to pursue a cassation appeal in the Supreme Court of Tajikistan and no other appeal avenues are available to him. He is currently being held in long-term solitary confinement in Tajikistan Prison No. 1, which is located on Mirzo Tursunzoda Street in Dushanbe. Mr. Hayit has reportedly been severely injured while in prison and has been denied medical care.

Legal analysis

17. The source asserts that the detention of Mr. Hayit constitutes an arbitrary deprivation of his liberty under categories I, II and III.

Violation of category I: lack of legal basis for detention

18. The source submits that the detention of Mr. Hayit is arbitrary under category I as the Tajik authorities lack a legal basis for continuing to detain him.

19. According to the source, the Government of Tajikistan violated article 9 (2) and (3) of the Covenant by denying Mr. Hayit his rights to be informed of the charges against him at the time of arrest and to be brought promptly before a judge. He was initially held incommunicado and was not informed of the charges against him. He was held for three days without access to judicial review of his detention, and for 10 days without communication with the outside world, which are contrary to the requirements of article 9 of the Covenant for a lawful detention.

20. The source submits that the Government also violated article 15 (1) of the Covenant and article 11 (2) of the Universal Declaration of Human Rights, both of which purport to guarantee individuals the right to know what the law is and what conduct violates the law. The source asserts that the Criminal Code of Tajikistan defines criminal acts in a manner that is overly broad and that Mr. Hayit was convicted under imprecisely worded provisions of that Code that are impermissibly vague.

21. The source also submits that the Government failed to support the conviction of Mr. Hayit with substantive evidence and that it presented evidence gleaned in an illegal manner, thus violating article 9 (1) of the Covenant.

Violation of category II: substantive fundamental rights

22. The source submits that the detention of Mr. Hayit is arbitrary under category II because the Government detained him for having exercised his rights to freedom of opinion and expression, association and political participation, in violation of articles 19, 21, 22 and 25 of the Covenant, articles 19, 20 and 21 of the Universal Declaration of Human Rights, as well as articles 27 and 28 of the Tajik Constitution.

23. According to the source, the repeated attempts by the Government to silence Mr. Hayit through violence and intimidation, the speech-related arguments set forth by the Government at trial and the Government's pattern of harassing critical voices are all evidence that the conviction of Mr. Hayit was in retaliation for his dissent. Prior to his arrest, he had been subjected to intense surveillance and at least one brutal attack. At his trial, the Government alleged that he had written an inflammatory article and had disseminated information inciting religious and political hatred and discord. However, according to the source, the article had not advocated violence and was therefore neither a threat to national security or public order, health or morals. The source also alleges that Mr. Hayit's detention fits in with a larger trend by the Government of arresting or harassing opposition party members, journalists and other critical voices. The source notes that Mr. Hayit's political expression and criticism of the Government is protected expression and the Government has failed to show that his expression had advocated violence or had otherwise demonstrated a specific threat to security or public order.

24. The source also submits that Mr. Hayit was targeted because of his association with the Islamic Renaissance Party. In that respect, the source submits the following elements: (a) the Government's history of persecution of Mr. Hayit for his work with the Party; (b) the fact that one of the charges levelled against him explicitly criminalized his association with the Party on the grounds of conspiracy; (c) the focus of the interrogation of Mr. Hayit on the alleged criminal intent of the Party as an organization; (d) the joint trial of 13 Party members, convicted without any substantiating evidence; and (f) the wider context of repression against the Party as a whole, including banning the organization and attacking attorneys who defended its members. The source asserts that the above elements demonstrate that the arrest, detention and conviction of Mr. Hayit were partly driven by his mere association with the Party.

25. The source notes that, although the rights to free expression and free association may be restricted as necessary for the protection of national security or public order, health or morals or protection of the rights and freedoms of others, the scope of such permissible restrictions is extremely narrow and does not apply in the present case because the restriction of Mr. Hayit's expression was not necessary for the protection of an enumerated purpose. The vague factual allegations by the Government against Mr. Hayit failed to specify with any precision the nature of the threat posed by his expression of peaceful political dissent or his association with the Islamic Renaissance Party. To that end, the source asserts that the Government was instead using the veil of national security as a pretext to silence criticism and disband an opposition party.

26. The source also asserts that the detention of Mr. Hayit violates his right to participate in public affairs and political life, as enshrined under article 21 (1) of the Universal Declaration of Human Rights, article 25 (a) of the Covenant, as well as article 27 of the Tajik Constitution. The detention of Mr. Hayit was a direct response to his exercise of the right to participate in the conduct of public affairs as a member and leader of the opposition Islamic Renaissance Party. At the time of his arrest, he had been Deputy Chairman of the Party and had played a critical role in the party's political activities, including running for public office and making public remarks critical of the Government. Mr. Hayit had reportedly been vocal in his criticism of the Government and had publicly and aggressively opposed Government policies and corruption. The source alleges that his detention was part of a pattern of actions taken by the Government to punish political dissidents and chill political participation. Moreover, the effect of the judgment against Mr. Hayit was not only to punish him because of his past political participation, but also to hinder directly his future ability to exercise his right to political participation.

Violation of category III: due process rights

27. The source further asserts that the detention of Mr. Hayit is arbitrary under category III because the Government denied him his due process rights under international and domestic law.

28. According to the source, the Government violated the right of Mr. Hayit to privacy under article 12 of the Universal Declaration of Human Rights and article 17 of the Covenant by conducting warrantless searches of his home and by confiscating documents and items in the course of those searches.

29. The Government reportedly also violated article 9 (2) of the Covenant and principle 10 of the Body of Principles for the Protection of Persons under Any Form of Detention or Imprisonment by depriving Mr. Hayit of the right to be informed of the reason for the arrest or charges against him. In addition to not informing him of the charges against him for three days after his arrest, he and his lawyers were not provided with a full list of the legal bases of the charges brought against him for nearly five months. The Government provided neither Mr. Hayit nor his lawyers with access to the criminal complaint against him for several months, until shortly before the commencement of his trial. Prior to that time, he and his lawyers had thus been unable to confirm all the charges that had been brought against him.

30. Furthermore, the Government reportedly violated articles 9 (3)–(4) of the Covenant and principles 4, 11, 32 and 37 of the Body of Principles by denying Mr. Hayit the right to challenge the legality of his continued detention. The Government allegedly held him incommunicado and refused to let him challenge his detention from 16 to 19 September 2015, a time frame that exceeds the requirement that a detainee be brought "promptly" (within 48 hours) before a judge. The source alleges that the violation by Tajikistan of article 9 (3)–(4) enabled other violations, such as torture, to occur while he was being held without access to his attorney or family.

31. According to the source, the Government also denied Mr. Hayit his right to release pending trial under article 9 (3) of the Covenant and principles 38 and 39 of the Body of Principles by holding him in pretrial detention without the judge who adjudicated such detention having given any specific and individualized reasons for refusing his release on bail.

32. The Government further violated article 14 (3) (b) of the Covenant, principles 18–20 of the Body of Principles, rule 61 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and article 19 of the Tajik Constitution by denying Mr. Hayit prompt access to the counsel of his choosing and the ability to communicate with counsel in private. He was reportedly denied access to counsel for 10 days following his arrest and was thereafter never permitted to speak to his lawyers confidentially. In addition, the lawyers of Mr. Hayit were themselves harassed, with at least one being subsequently arrested.

33. The source also submits that the Government violated article 14 (3) (b) of the Covenant and principles 18 (2) and 11 (1) of the Body of Principles by failing to give Mr. Hayit and his lawyers adequate time and opportunity to prepare a defence. The lawyers of Mr. Hayit did not have access to the Government's complaint against him until less than 16 days before the trial. The defence lawyers were also denied pretrial access to any evidence, including witness lists, deemed classified by the Government.

34. According to the source, the Government also violated the right of Mr. Hayit to a public trial under article 14 (1) of the Covenant and article 10 of the Universal Declaration of Human Rights by trying him in a closed-door trial. The Government reportedly made no effort to explain how it was "necessary and proportionate" to exclude the public or to set up other mechanisms for observation that might have guaranteed the fairness of the proceedings.

35. The source further submits that the Government violated the right of Mr. Hayit to equality before the courts with an independent and impartial tribunal under article 14 (1) of the Covenant and article 19 of the Tajik Constitution. The trial of Mr. Hayit was allegedly conducted within a context where the President had nearly complete control over the

judiciary. The source asserts that virtually all of the information available regarding the trial of Mr. Hayit suggests that the proceedings were heavily weighted against him and his co-defendants, who were not afforded equal procedural rights to those of the prosecution: the defence team was not given full access to the prosecution's evidence; the defendants were presented to the court in shackles, bruised and bleeding from their forced run to the courthouse; the court allowed as evidence information that had been obtained through an illegal search and witness testimony, which was tainted by credible torture allegations; the court did not give any weight to the claim by a witness that he had been coerced into giving false testimony; the court denied the defence their motion to present expert witnesses, despite the fact that the prosecution was able to present its expert witnesses; and the court reached a guilty conviction despite a reported total lack of concrete links tying Mr. Hayit to the failed coup.

36. According to the source, the Government also violated the right of Mr. Hayit to a tribunal established by law under article 14 (1) of the Covenant when it tried Mr. Hayit, a civilian, under a specially constituted court presided over by the Chief Military Judge.

37. The Government reportedly further violated the right of Mr. Hayit to a presumption of innocence under article 14 (2) of the Covenant, article 11 (1) of the Universal Declaration of Human Rights, principle 36 of the Body of Principles and rule 111 (2) of the Nelson Mandela Rules when the President and State-owned media expressed certainty about the guilt of the members of the Islamic Renaissance Party prior to their trial. In addition, Mr. Hayit was presented to the court in shackles.

38. The source submits that the Government also violated the right of Mr. Hayit to examine witnesses under article 14 (3) (e) of the Covenant by denying his lawyers full access to the prosecution's witness list, thus preventing them from properly preparing for cross-examination. He was also not permitted to introduce his own expert witness.

39. According to the source, the Government violated the right of Mr. Hayit to freedom from torture and other cruel, inhuman, or degrading treatment or punishment under articles 7, 10 (1) and 14 (3) (g) of the Covenant, articles 1, 2 and 16 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 5 of the Universal Declaration of Human Rights, principles 1 and 6 of the Body of Principles, rule 1 of the Nelson Mandela Rules and article 18 of the Tajik Constitution. During his interrogations and subsequent detention, Mr. Hayit was allegedly subjected to beatings, resulting in broken bones and put in stress positions. Furthermore, he has been denied medical care, placed in solitary confinement, and subjected to substandard prison conditions.

40. Finally, the source submits that the Government violated the right of Mr. Hayit to a reasoned appeal under article 14 (5) of the Covenant, as there is no indication that the appellate review of his conviction included any meaningful engagement with the allegations or facts of his case. Rather, according to the source, the conclusion of the Supreme Court for every issue raised by Mr. Hayit on appeal was simply that his arguments were necessarily without foundation because they contradicted the allegations put forward by the Government, which the Supreme Court accepted at face value. There is also no indication that the Supreme Court considered whether the numerous procedural defects warranted reversal of the decision of the trial court.

Response from the Government

41. On 6 December 2017, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 5 February 2018, detailed information about the current situation of Mr. Hayit and any comments on the source's allegations.

42. On 6 March 2018, the Working Group received a reply from the Government, which was subsequently transmitted to the source for its further comments. This reply was more than a month late, and the Working Group notes that the Government did not request an extension of the time limit for its reply, as provided for in the Working Group's methods of work. Therefore, the Working Group cannot accept the reply as if it was presented in a timely manner.

43. However, the Working Group notes with appreciation the further comments submitted by the source on 21 March 2018 in response to the Government's reply.

Discussion

44. In the absence of a timely response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

45. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

46. The source has submitted that Mr. Hayit's deprivation of liberty is arbitrary and falls under categories I, II and III. The Working Group shall consider these in turn.

47. The source argues that the detention of Mr. Hayit falls under category I as he was held incommunicado following his initial arrest. According to the source, Mr. Hayit was held for three days without access to a judge, unable to challenge the legality of his detention, and for 10 days without contact with the outside world, including his lawyer. The source also argues that the crimes that Mr. Hayit was charged with had been formulated in an overly vague manner in the Tajik Criminal Code, and this therefore cannot constitute a proper legal basis for his detention.

48. The Working Group observes that the Government in its late reply has not contested the fact that Mr. Hayit was arrested on 16 September 2015 and that it was only on 19 September 2015 that he was brought before a judge, who confirmed his pretrial detention. This was the first time that Mr. Hayit appeared before a judge. The Government claims that there was in fact only a 48-hour period from the moment of arrest until Mr. Hayit was presented to the judge for a pretrial detention hearing. The Working Group also notes that it was in the realm of the Government to specify the exact times of both the arrest and the appearance before the court, something that the Government failed to do in its late reply. The Working Group therefore concludes that the period must have exceeded 48 hours. As the Government claims, Mr. Hayit was arrested on 16 September, so even if this arrest took place late in the evening of that day, his appearance before the judge only on 19 September means that he would have been in custody for a period longer than 48 hours.

49. However, as the Human Rights Committee noted in its general comment No. 35 (2014) on liberty and security of person, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances. The Working Group notes that the Government has not provided any such justifications but merely asserted that the period constituted 48 hours. The Working Group is unable to accept this assertion and thus finds a breach of article 9 of the Covenant.

50. Moreover, the Working Group observes that in its late reply the Government did not contest that the hearing on 19 September concerned the decision as to whether Mr. Hayit was to be remanded in custody. As such, this was not a hearing for the exercise of Mr. Hayit's right to challenge the legality of his detention.

51. The Working Group wishes to recall that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society. According to the Basic Principles and Guidelines, that right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty, applies to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or

psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes. Moreover, it also applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.

52. In the present case, Mr. Hayit was held in detention for a period over 48 hours before he was brought in front of a judge, which was for a hearing on the application of pretrial detention. That means that, during those three days, Mr. Hayit was deprived of the possibility to challenge the legality of his detention. However, without the affirmation by the judiciary that the detention is indeed legal, the detention cannot be said to have a legal basis. The Working Group reiterates that the right to challenge the legality of detention belongs to everyone, a right which was denied to Mr. Hayit for the first three days of his detention.

53. The Working Group notes a further discrepancy between the submissions made by the source and by the Government in its late reply. The Government claims that a lawyer was appointed to Mr. Hayit on the day of his arrest, namely, on 16 September 2015, who was present during his interrogation on the same day. The source claims that Mr. Hayit was held without any contact with the outside world, including his lawyer, for the first 10 days.

54. In that respect, the Working Group notes that it was within the realm of the Government to provide the copies of the requisite documents that would certify the date Mr. Hayit was granted access to his lawyer, something that the Government failed to do in its late reply. The Working Group thus finds that there has been a denial of legal assistance in violation of article 14 (3) (b) of the Covenant, principle 17 (1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and principle 9 of the Basic Principles and Guidelines.

55. Moreover, the Government has failed to explain when Mr. Hayit was notified of the charges against him, and the Working Group must therefore accept the submission made by the source that such notification did not take place.

56. The Working Group recalls that article 9 (2) of the Covenant requires that anyone who is arrested is not only promptly informed of the reasons for arrest but also promptly informed of any charges against them. The right to be promptly informed of charges concerns notice of criminal charges and, as the Human Rights Committee has noted in its general comment No. 35, that right applies in connection with ordinary criminal prosecutions and also in connection with military prosecutions or other special regimes directed at criminal punishment.

57. In the present case, Mr. Hayit was held for three days before he appeared before a judge, who decided that he was to be remanded in custody. During that time, no formal charges were levied against him that would have legitimized his detention. This means that the Tajik authorities effectively did not formally invoke any legal basis justifying the detention of Mr. Hayit for three days. The Working Group therefore concludes that the detention of Mr. Hayit for three days without informing him of the charges and without presenting him before a judge to enable him to challenge the legality of his detention was arbitrary and falls under category I.

58. The source has also submitted that the detention of Mr. Hayit is arbitrary and falls under category II, as his detention was in breach of articles 19, 21, 22 and 25 of the Covenant. In its late reply, the Government has merely rejected those submissions, stating that Mr. Hayit was not prosecuted and sentenced for his political views or expressions but rather because of a plot to use violence to overthrow the constitutional make-up of Tajikistan. However, the Working Group notes that in its late reply the Government failed to specify what Mr. Hayit had done in pursuit of such an aim as there was no description of any actions undertaken by him that could be construed as such a plot.

59. The Working Group firstly notes that, as the Human Rights Committee has stated in its general comment No. 34 (2011) on the freedoms of opinion and expression, freedom of opinion and freedom of expression as expressed in article 19 of the Covenant are

indispensable conditions for the full development of the person; they are essential for any society and in fact constitute the foundation stone for every free and democratic society.

60. The Committee has further stated in the same general comment that the freedom of expression includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, and that right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions. Moreover, the permitted restrictions to that right may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals. The Committee went on to stipulate that restrictions are not allowed on grounds not specified in paragraph 3 of the general comment, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated. It should be noted that article 21 of the Covenant permits restrictions to the right of assembly on the same three grounds.

61. In the present case, the Government of Tajikistan in its late response to the submissions made by the source has not invoked any of the permitted restrictions; it has cited a number of criminal acts allegedly committed by Mr. Hayit without any explanation as to what actions led to those violations. It is quite clear to the Working Group that the basis for the arrest and subsequent detention of Mr. Hayit was in fact his exercise of freedom of expression and freedom of assembly. The Government has alleged that Mr. Hayit had been involved in the protest that took place on 4 September 2015 and resulted in a number of deaths. However, when making such allegations the Government has provided no evidence in their support, and it appears to the Working Group that those allegations follow the pattern of harassment that Mr. Hayit had experienced for years prior to the events of September 2015.

62. While the freedom of expression and freedom of assembly are not absolute rights, the Human Rights Committee has stated in the above-mentioned general comment that, when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Moreover, it stipulates that paragraph 3 of that general comment may never be invoked as a justification for the muzzling of any advocacy of multiparty democracy, democratic tenets and human rights.

63. Moreover, the Working Group also finds that the right of Mr. Hayit to take part in the conduct of public affairs as specified in article 25 of the Covenant has been violated since his arrest was directly linked to the fact that he had been a prominent member of the Islamic Renaissance Party. The Working Group recalls that the Human Rights Committee, in its general comment No. 25, has emphasized that citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. That participation is supported by ensuring freedom of expression, assembly and association. Noting the essential link between the rights to freedom of expression, assembly and association, the Committee also emphasizes that the right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25. The Government has presented no explanation how the actions of Mr. Hayit as a member of the Party had led to the commission of a specific crime, and the Working Group therefore also finds his arrest to be the result of his exercise of rights under article 25 of the Covenant.

64. The Working Group therefore concludes that Mr. Hayit was detained because of his exercising his freedom of expression, freedom of assembly and his right to take part in the conduct of public affairs, and therefore falls under category II.

65. Given its finding that the deprivation of liberty of Mr. Hayit is arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Hayit should have taken place. However, the trial did take place, and the source has submitted that the detention of Mr. Hayit was arbitrary and falls under category III since: (a) his lawyers were not notified of the full charges against him for nearly five months; (b) his lawyers were only given two weeks to study the full accusations; (c) the trial was presided over by a

military judge; (d) his lawyers were not given access to the full list of witnesses, and Mr. Hayit was unable to call witnesses on his behalf; (e) he was subjected to beatings, resulting in broken bones, and put into stress positions during his interrogations and subsequent detention; (f) State media expressed certainty of his guilt before the final judgment; (g) he was presented to the court in shackles; (h) the trial took place behind closed doors; and (i) there was no public announcement of the reasoned judgment.

66. The Working Group observes that in its late reply the Government failed to address any of the submissions made by the source with the exception of noting that Mr. Hayit's lawyers had been provided with the opportunity to study the full case file from 28 December 2015 until 14 January 2016. The Working Group observes that this was a period of 18 days, during which there was a period of festivities in the State party. Article 14 (3) (b) of the Covenant requires that everyone charged with a criminal offence be given adequate time and facilities to prepare for a defence. The Working Group finds it difficult to accept that this was observed in the present case and that the time given to the defence was sufficient to study the charges in such a complex case where the accused faced over a dozen charges and the possibility of a life sentence. However, the source has also failed to explain whether the defence team submitted requests for more time to be provided and whether such requests were denied. Without such information, the Working Group is unable to conclude that there has been a breach of article 14 (3) (b).[1]

67. The Government in its late reply also rejected the allegation that Mr. Hayit had been subjected to beatings, resulting in broken bones, and put into stress positions during his interrogations and subsequent detention. The Government in its late reply noted that Mr. Hayit had been examined on 11 June 2017 by a medical doctor, who had found no evidence of any ill-treatment. The Working Group, however, points out that this examination took place nearly two years after Mr. Hayit's arrest and the interrogations with the alleged beatings. This is a considerable period of time that might have allowed any physical signs of ill-treatment to disappear. The Working Group notes the absence of any submissions on behalf of the Government in relation to the alleged treatment of Mr. Hayit in 2015.

68. In the view of the Working Group, the treatment described by the source would appear to reveal a prima facie breach of the absolute prohibition of torture and ill-treatment, which is a peremptory norm of international law, as well as of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, principle 6 of the Body of Principles and rule 1 of the Nelson Mandela Rules. The Working Group also notes that the use of a confession extracted through ill-treatment that is tantamount if not equivalent to torture may also constitute a violation by Tajikistan of its international obligation under article 15 of the Convention against Torture. Furthermore, the Body of Principles specifically prohibits taking undue advantage of the situation of detention to commit confession or incriminating statements (see principle 21).[2] It is also a breach of article 14 (3) (g) of the Covenant. The Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

69. In addition, the Government has not responded to the submission made by the source that the lawyers of Mr. Hayit were not notified of the full charges for nearly five months, which means that the defence team probably learned of the full charges only when they were given access to the full file of the case. Such a situation cannot be reconciled with the obligations undertaken by Tajikistan under article 14 (3) (a) of the Covenant, which requires prompt and detailed notification of charges, and the Working Group thus finds that this provision has been violated.

70. Moreover, the Government also has not responded to the submission made by the source that Mr. Hayit's lawyers were not given full access to the list of witnesses, that he was prevented from bringing witnesses on his behalf and that his lawyers did not have full access to all the evidence deemed classified by the authorities. As the Human Rights

[1] See *Grant v. Jamaica* (CCPR/C/56/D/597/1994); and *Sawyers and McLean v. Jamaica* (CCPR/C/41/D/226/1987).

[2] See also opinions No. 48/2016, 3/2017, 6/2017 and 29/2017.

Committee states in paragraph 39 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, there is a strict obligation to respect the right to have witnesses admitted that are relevant for the defence and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings. In the present case, that right was denied to Mr. Hayit and such a refusal to allow witnesses on behalf of the defence bears the hallmarks of serious denial of equality of arms in the proceedings and is in fact a violation of article 14 (3) (e) of the Covenant. The Working Group is especially concerned at this violation, given that one of the witnesses recanted his testimony.[3]

71. Furthermore, the Working Group notes that the defence lawyers were denied full access to all the evidence deemed classified by the authorities, which was not explained by the Tajik authorities in the late reply. This is a serious violation of the principle of the right to equality of arms, under article 10 of the Universal Declaration of Human Rights and articles 14 (1) and 14 (3) (b) of the Covenant, and the rights to a fair hearing and to have adequate time and facilities for the preparation of the defence "in full equality".[4] Since the Government did not submit any information in response to the Working Group's regular communication, it has therefore not demonstrated why restricting access to classified information was necessary and proportionate in pursuing a legitimate aim, such as national security. It has also failed to demonstrate that less restrictive means, such as redacted summaries, providing copies of documents to Mr. Hayit and his lawyers for use within the authorized premises, or other means of accommodation, would have been possible to achieve the same result. The Working Group considers that the complete denial of access to classified evidence in this case is a violation of article 14 of the Covenant.

72. The Working Group is also concerned at the allegations of harassment that was sustained by the lawyers of Mr. Hayit and wishes to underline that it is the legal and positive duty of the State to protect everyone on its territory or under its jurisdiction against any human rights violation and to provide remedies whenever a violation still occurs. The Working Group especially recalls that the Basic Principles and Guidelines state that legal counsel shall be able to carry out their functions effectively and independently, free from fear of reprisal, interference, intimidation, hindrance or harassment. In the view of the Working Group, this also constitutes a violation of article 14 (3) (b) of the Covenant. The Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

73. In its late reply, the Government has also not presented any explanation in relation to the submission made by the source that the trial of Mr. Hayit was presided over by a military judge. The Working Group observes that it is within its mandate to assess the overall proceedings of the court and the law itself to determine whether they meet international standards.[5] In relation to the jurisdiction of the military court, the Working Group has in its practice consistently argued that the trial of civilians by military courts is in violation of the Covenant and customary international law and that, under international law, military tribunals can only be competent to try military personnel for military offences.[6] Moreover, in the present case, the Government had the opportunity to explain the reasons for the trial being presided over by a military judge but has failed to do so.

74. The Government in its late reply has also failed to address the submissions made by the source that State media expressed certainty over the guilt of Mr. Hayit before the final judgment, and that he was presented to the court in shackles. The Working Group observes that the media should avoid news coverage undermining the presumption of innocence.[7] It notes that, in this particular case, it was the State media that reported on the alleged guilt of Mr. Hayit. It also notes that the Government has failed to provide any explanation as to

[3] See paragraph 12 above.

[4] See e.g. opinions No. 18/2018, paras. 52 and 53; 89/2017, para. 56; 50/2014, para. 77; 19/2005, para. 28 (b), in which the Working Group reached a similar conclusion on the violation of the principle of equality of arms when classified information is withheld from the defendant.

[5] See opinions No. 33/2015, No. 15/2017, No. 30/2017 and No. 78/2017.

[6] See A/HRC/27/48, paras. 67–68; and opinions No. 44/2016, No. 30/2017 and No. 78/2017.

[7] See Human Rights Committee general comment No. 32, para. 30.

what warranted the need to shackle Mr. Hayit during his court appearance. The Working Group therefore concludes that there has been a breach of article 14 (2) of the Covenant.

75. Furthermore, the Government has also not provided any explanation to the submissions made that the trial of Mr. Hayit took place behind closed doors. As the Human Rights Committee states in paragraph 29 of its general comment No. 32:

> Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons.

76. The Working Group notes that the case of Mr. Hayit clearly did not fall into any of the prescribed exceptions to the general obligation of public trials under article 14 (1) of the Covenant, and the Government of Tajikistan had not invoked any of those exceptions to justify the closed trial. The Working Group thus finds a violation of article 14 (1) of the Covenant.

77. The Working Group further notes that the failure to provide a public, reasoned judgment in the case of Mr. Hayit constitutes a breach of article 14 (5) of the Covenant, as it effectively prevents the prospective appellant from enjoying the effective exercise of the right to appeal.[8]

78. In sum, the Working Group finds that the trial of Mr. Hayit was carried out in total disregard for the guarantees encapsulated in article 14 (1), (2), (3) (a), (e) and (g) and (5) of the Covenant, and that those violations were of such gravity as to give the deprivation of liberty of Mr. Hayit an arbitrary character (category III).

Disposition

79. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Haritos Mahmadali Rahmonovich Hayit, being in contravention of articles 9, 10, 19, 20 and 21 of the Universal Declaration of Human Rights and of articles 9, 14, 19, 21 and 25 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and III.

80. Consequent upon the opinion rendered, the Working Group requests the Government of Tajikistan to take the steps necessary to remedy the situation of Mr. Hayit without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

81. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Hayit immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

82. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Hayit, and to take appropriate measures against those responsible for the violation of his rights.

83. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on independence of judges and lawyers and the Special Rapporteur on torture, for appropriate action.

[8] Ibid, para. 49.

Follow-up procedure

84. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Hayit has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Hayit;

(c) Whether an investigation has been conducted into the violation of Mr. Hayit's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Tajikistan with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

85. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

86. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

87. The Government should disseminate through all available means the present opinion among all stakeholders.

88. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[9]

[*Adopted on 17 April 2018*]

[9] See Human Rights Council resolution 33/30, paras. 3 and 7.